

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 967 of 1978.

For Approval and Signature:

Hon'ble the Chief Justice MR.JUSTICE K. SREEDHARAN and  
Hon'ble MR.JUSTICE M.S. SHAH

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No

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2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?  
No

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SHREE DIGVIJAY CEMENT CO. LTD.

Versus

STATE OF GUJARAT AND ANOTHER  
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Appearance:

MR BHATT of M/S RP BHATT & CO for Petitioner.

MR KM MEHTA, AGP for the respondents.  
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CORAM : The Chief Justice MR.JUSTICE K. Sreedharan  
& Mr. Justice M.S. Shah.

Date of decision: 25/11/1997

CAV JUDGEMENT (Per Shah, J.)

This petition under Article 226 of the

Constitution is filed by a public limited Company engaged in the business of manufacturing and selling cement, asbestos, pipes etc. for a declaration that the notification issued by the State Government withdrawing the exemption from payment of electricity duty under the provisions of Bombay Electricity Duty Act, 1958 (hereinafter referred to as "the Act") is illegal and unconstitutional and for a declaration that the petitioner had started a new industrial undertaking which was entitled to exemption from payment electricity duty for the period from April 12, 1975 to April 11, 1980 and for refund of the amount of Rs. 1,15,457-08 paid by the petitioner under protest as electricity duty for the period from April 12, 1975 to March 31, 1978.

2. The petitioner Company having its registered office at Sikka in Jamnagar district established an industrial undertaking near village Ranip in Ahmedabad district in 1962 with a capacity to manufacture 32000 M.T. of asbestos cement products per annum under an industrial licence obtained under the provisions of Industrial Development and Regulation Act, 1951 (hereinafter referred to as "the IDR Act"). The capital cost incurred on the undertaking was Rs. 62,23,260.19 including plant and machinery. The petitioner was granted another industrial licence on September 2, 1967 to effect substantial expansion with an installed capacity for the manufacture of 36,000 M.T. of asbestos cement products per annum. The said new unit has been manufacturing asbestos pipes of the diameter of 150 mm to 450 mm as against the pipes of the diameter of 50 mm to 300 mm being manufactured by the first unit.

3. The petitioner commenced production at the said new plant from April, 1975 and made an application to the Collector of Electricity Duty on February 14, 1976 for exemption from payment of electricity duty from April, 1975 in respect of the new unit started under the aforesaid licence dated September 2, 1967, on the ground that the industrial undertaking set up for the purpose of manufacturing 36,000 M.T. of asbestos cement products as per industrial licence dated September 2, 1967 was a new industrial undertaking as provided under section 3(2) of the Act. The application came to be rejected by the respondent authorities.

The petitioner relied in the alternative on the State Government notification dated September 19, 1969 issued under Section 3(3) of the Act providing for remission of electricity duty in respect of energy consumed by an industrial undertaking established by

effecting substantial expansion to the existing industrial undertaking after October 1, 1969 for a period of five years from the date on which the industrial undertaking commenced manufacturing. By letter dated September 16, 1976 (Page 48), the Collector of Electricity Duty negatived the petitioner's request on ground that the remission was withdrawn from April 1, 1976 and also on the ground that the petitioner was not holding machineries to the extent of 100% in its expansion unit as compared with the machineries in the old unit. This petition, therefore, came to be filed for challenging the aforesaid decisions.

4. After admission of the petition, an affidavit-in-reply was filed by the Collector of Electricity Duty opposing the petition. There is no rejoinder to the said reply affidavit.

5. At the hearing of the petition, the learned counsel for the petitioner has raised the following contentions :-

- (i) The unit established by the petitioner under the industrial licence dated September 2, 1967 was a new industrial undertaking as defined by the provisions of section 3(2) of the Act. Even under the provisions of 80-J of the Income-tax Act, the additional cement unit of the petitioner Company was held to be a new industrial undertaking (144 ITR 532) and, therefore, the respondents ought to have granted the benefit of exemption of electricity duty to the petitioner for the period of five years from April, 1975 to April, 1980.
- (ii) Even if the new unit cannot be said to be a new industrial undertaking as contemplated under section 3(2) of the Act, the new unit was certainly entitled to the benefit conferred by the notification dated September 19, 1969 under which a unit where substantial expansion is effected at the factory premises of existing industrial undertaking is entitled to get the benefit of remission from payment of electricity duty.
- (iii) The petitioner's case is similar to that of Saurashtra Cement & Chemical Industries Ltd. which had also filed Special Civil Application No. 835 of 1978 which petition has been allowed by this Court as per judgment dated November 29,

6. On the other hand, Mr K.M. Mehta, learned Assistant Government Pleader has opposed the petition and submitted that the unit in question was not a new industrial undertaking but an expansion of the old unit. It is further submitted that the petitioner unit had not applied for the benefit of the Government notification dated September 19, 1969 until the said notification was withdrawn on April 1, 1976 and that the application for the benefit under the notification was made after withdrawal of the said remission. Even otherwise the petitioner did not fulfill the conditions stipulated in the aforesaid Government notification of 1969.

7. As far as the first contention urged on behalf of the petitioner is concerned, it is not possible to hold that the unit established by the petitioner Company as per industrial licence dated September 2, 1967 was a new industrial undertaking. Section 3(2) of the Act, in so far as the same is relevant for the purpose of the present petition, reads as under :-

"3(2). Electricity duty shall not be leviable on  
the units of energy consumed, --

(vii) for motive power and lighting in respect  
of premises used by an industrial  
undertaking for industrial purpose, until  
the expiry of the following period, that  
is to say :-

(a) xxx xxx xxx xxx

(b) in the case of new industrial  
undertaking established on or  
after the commencement date,  
which does not generate energy  
for its own use, five years from  
the commencement date or the date  
on which industrial undertaking  
commences for the first time  
manufacture or production of  
goods whichever is later:

Provided that no  
industrial undertaking shall be  
entitled to exemption from  
payment of electricity duty under

this clause, unless it has obtained a certificate regarding eligibility for such exemption in prescribed form by making an application therefor in prescribed form and within prescribed period to such officer as the State Government may, by notification in the Official Gazette, specify.

Explanation 1.-- For the purpose of clause (vii) of this sub-section and sub-section (2-A)

(i) xxx xxx xxx

(ii) "a new industrial undertaking" means any such industrial undertaking which -

(a) is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State; or

(b) is not formed by transfer to a new business or undertaking of a building, machinery or plant previously used in the State for any industrial purpose, of such value in relation to total investments, as the State Government may, by notification in the Official Gazette, specify; or

(c) is not an expansion of the existing business or undertaking in the State."

A bare perusal of sub-clause (c) of clause (ii) of sub-section (2) of Section 3 makes it clear that any expansion of the existing business or undertaking in the State does not qualify the unit to be treated as a new industrial undertaking. Admittedly, the industrial licence dated September 2, 1967 was for manufacture of asbestos products at the same factory premises where the petitioner was already carrying on its manufacturing activities since 1962. The submission urged by the learned counsel for the petitioner that in C.I.T. vs.

Shree Digvijay Cement Co. Ltd., 144 ITR 532 the additional cement unit of the petitioner Company was held to be a new industrial undertaking under the provisions of Section 80-J of the Income-tax Act, 1961 cannot be of any help to the petitioner, since the definition of "a new industrial undertaking" under Section 80 J of the Income-tax Act contains the aforesaid two exclusions (a) and (b) but not (c). In view of th this material distinction between the relevant statutory provisions, the first contention cannot be upheld. Even otherwise, there is no plea of similar exemption uder section 80 J of the Income-tax ACT in respect of this very asbestos pipe unit which is the subject matter of this petition.

8. As far as the second contention is concerned, Mr Bhatt has urged that since the Government notification dated September 19, 1969 (Annexure "A" to the affidavit-in-reply) itself provides that where substantial expansion is effected at the factory premises of the existing industrial undertaking, the petitioner was entitled to get the benefit of remission. The petitioner had, however, not applied for the benefits under the aforesaid notification dated September 19, 1969 within the time limit stipulated in the aforesaid notification i.e. 90 days from the date of production as stipulated in Clause (7) of the Notification. Even then the petitioner could have applied for remission with the corresponding reduction in the period of remission, but the petitioner chose not to apply for remission before May 14, 1976. Before that the remission notification came to be withdrawn on April 1, 1976. The petitioner having not acquired any vested right under the said notification dated September 19, 1969, it can not make any grievance if its application made after April 1, 1976 was rejected on that ground. It is, of course, true that the petitioner had submitted his first application dated February 14, 1976 (Annexure - A Page 42) which was received by respondent no. 2 on February 17, 1976 but that was an application for exemption from duty and not for remission from duty under the notification dated SEptember 19, 1969.

9. Mr Bhatt has further contended that since the authority rejected the petitioner's application for the benefit of remission under the aforesaid notification of 1969 on merits also, the withdrawal of notification cannot preclude him from challenging the decision on merits. We are not inclined to accept this argument. Just as the petitioner has been pleading its case before

the authorities in the alternative, it was open to the authorities to reject the application on a preliminary ground as well as a substantive ground. That cannot take away the right of the authority to defend its decision on the preliminary ground.

10. Mr Bhatt has also submitted that the respondent has found that the investment in the expansion unit was to the tune of Rs. 46.91 lacs and that the said unit was for manufacturing 36,000 M.T. of asbestos cement products whereas the first unit was having manufacturing capacity of 32,000 M.T. of asbestos pipes of diameter of 50 mm to 300 mm and was set up at the cost of Rs. 44.33 lacs and, therefore, there was no reason to deny the benefit under the notification of 1969. According to Mr Bhatt, the respondents could not have compared the investment made in the expansion unit with the total investment of Rs. 2,29 Crores made by the petitioner Company which has plants at more than one place in the State. In view of the finding already given by us that having applied for remission after withdrawal of the notification, the petitioner was not entitled to have its application considered on merits, we would not be required to go into the merits of the aforesaid contention.

Assuming that the petitioner was entitled to have its application considered on merits, even then the impugned decision of the respondent authorities cannot be said to be arbitrary or even erroneous, because the petitioner's original case as set out in para 2 of the memo of the petition is that the petitioner had set up the first unit at the capital cost of RS. 62 lacs. Clause (1) of the Government notification dated September 19, 1969 required that for the expansion to qualify for remission, capital investment on expansion shall not be less than 100% capital investment made in the existing industrial undertaking. Since the capital investment on the second unit was only Rs. 44 lacs as against investment of Rs. 62 lacs in the existing unit, the application was rightly rejected.

11. As far as the last contention urged by Mr Bhatt is concerned, the decision in the case of Saurashtra Cement & Chemical Industries Ltd. is of no avail to the petitioner company, because in that case this Court found on facts that that Company had set up a new undertaking with investment of Rs. 2.2 Crores with a separate building and installation of new kiln with separate silos, lepol and nodulizers and cement mills and that, therefore, it was not simply an expansion as contemplated

by section 3(2) of the Act, merely because the new unit was incidentally making use of existing idle capacity of machineries, packing machines, crushers, cranes etc. of the old unit. In the instant case, on the basis of the material on the record of this petition, it is not possible to give any such finding that the additional investment made by the unit was not an expansion, but establishment of a new industrial undertaking.

12. In view of the aforesaid discussion, it has to be held that the petition is devoid of merits. The petition is accordingly dismissed.

Rule is discharged with no order as to costs.

Sd/-

(K. Sreedharan, C.J.)

Sd/-

(M.S. Shah, J.)